

# Nicoletti Hornig & Sweeney

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MICHAEL F. MCGOWAN  
VINCENT A. SUBA  
SAMUEL C. COLUZZI †  
GUERRIC S.D.L. RUSSELL †  
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October 4, 2010

## VIA ECF

Honorable Roanne Mann  
United States Magistrate Judge  
United States District Court  
225 Cadman Plaza East  
Brooklyn, New York 11201

RE: *In the Matter of the Petition of North East Marine Inc. as Owners  
Of the Tug ELENA, a 35' Deck Barge and a 40' Deck Barge  
For Exoneration From and Limitation of Liability*  
United States District Court – Eastern District of New York  
Case No.: CV-09-5600 (Amon, J) (Mann, M.J.)  
Our File No.: 10000530 DRH/GSR

Dear Judge Mann:

This firm represents the Plaintiff in Limitation North East Marine, Inc. in the above-captioned case pending in the United States District Court for the Eastern District of New York.

On September 28, 2010, North East Marine, Inc. noticed the deposition of the Claimant Robert Boody for Friday October 8, 2010. (A copy of the Notice of Deposition is attached hereto.) On September 29, 2010, counsel for the Claimant Robert Boody advised that they would not produce Robert Boody for a deposition on October 8<sup>th</sup> on the grounds that there was a pre-motion conference scheduled before Judge Amon scheduled on October 20, 2010. (A copy of Elizabeth Blair Starkey, Esq.'s letter dated September 29, 2010 is attached hereto.) On September 30, 2010, we responded to counsel for Robert Boody advising that there was no Order staying discovery and/or any other legitimate basis for not producing their client for a deposition as notice. (Copy attached) We have also attempted to resolve this matter through a telephone conversation with counsel for Robert Boody who continues to refuse to produce their client for a deposition on October 8, 2010.

October 4, 2010

Page 2

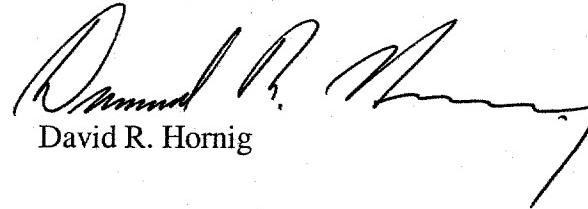
On September 13, 2010, the Court entered an Order by endorsements extending the parties' time to complete discovery to November 20, 2010. There has been no further Order staying discovery or otherwise precluding any party from conducting any and all discovery permitted under the Federal Rules of Civil Procedure. The Plaintiff in Limitation would be severely prejudiced if they were precluded from conducting any discovery including but not limited to the deposition of the Claimant Robert Boody until the issue concerning the lifting of the stay is resolved by the district court. Ultimate resolution of the issue of whether the automatic stay should be lifted may not be resolved until after the date that all discovery is required to be completed in this case. Furthermore, there is no harm to the Claimant Robert Boody to appearing for a deposition since his testimony in the federal action could be used in the state court action, assuming that the stay enjoining the action filed in the state court was lifted by the district court.

Lastly, there is no justifiable basis on which a party can unilaterally refuse to produce a witness properly noticed for a deposition without first seeking and obtaining an Order from the Court staying discovering. The Plaintiff in Limitation respectfully requests that an Order be entered directing Robert Boody to appear for a deposition as noticed by the Plaintiff in Limitation on October 8, 2010.

Respectfully submitted,

NICOLETTI HORNIG & SWEENEY

By:



David R. Hornig

DRH/mar  
Attachments

cc: (w/attachments)

**VIA ECF**

HOFMANN & ASSOCIATES  
Attorneys for Claimant  
ROBERT BOODY  
360 West 31<sup>st</sup> Street, Suite 1506  
New York, New York 10001-2727  
Tel. No.: (212) 465-8840

Attention: Elizabeth Blair Starkey, Esq.

October 4, 2010

Page 3

**PILLINGER MILLER TARALLO, LLP**

Attorneys for Claimant

**EL SOL CONTRACTING and  
CONSTRUCTION CORPORATION**

570 Taxter Road, Suite 275

Elmsford, New York 10523

Tel. No.: (914) 703-6300

File No.: LIB-00105/JTM

Attention: Jeffrey T. Miller, Esq.

**RUBIN, FIORELLA & FRIEDMANN LLP**

Attorneys for Claimant

**METRO MARINE SALES, INC.**

292 Madison Avenue, 11<sup>th</sup> Floor

New York, New York 10017

File No.: 431-14563

Attention: Brendan Burke, Esq.

**HERZFELD & RUBIN, P.C.**

Attorneys for Claimant

**FRANCOIS GUILLET**

125 Broad Street

New York, New York 10004

Attention: James Donat, Esq.

NICOLETTI HORNIG & SWEENEY  
Wall Street Plaza, 7<sup>th</sup> Floor  
New York, New York 10005-1801  
(212) 220-3830

Attorneys for Petitioner  
NORTH EAST MARINE, INC.  
Our File No.: 10000530 DRH/GSR

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

---

IN THE MATTER OF THE PETITION OF  
NORTH EAST MARINE, INC., AS OWNER OF  
THE TUG ELENA, A 35' DECK BARGE AND A  
40' DECK BARGE, FOR EXONERATION  
FROM AND LIMITATION OF LIABILITY

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09-CV-5600 (CBA)(RLM)

**NOTICE OF DEPOSITION**

S I R S :

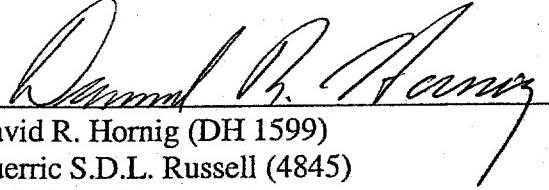
PLEASE TAKE NOTICE that the PLAINTIFF IN LIMITATION, NORTHEAST MARINE, INC. will take the deposition of the Claimant, ROBERT BOODY at the offices of NICOLETTI HORNIG & SWEENEY, Wall Street Plaza, 88 Pine Street, 7<sup>th</sup> Floor, New York, New York 10005 on the 8<sup>th</sup> day of October, 2010 at 10:00 a.m. and continuing from day-to-day thereafter until completed.

PLEASE TAKE FURTHER NOTICE that said Claimant, ROBERTY BOODY is to produce at the same time and place all materials, documents and other items denoted on the attached schedule of documents to be produced.

Dated: New York, New York  
September 27, 2010

NICOLETTI HORNIG & SWEENEY  
Attorneys for Petitioner  
NORTH EAST MARINE, INC.

By:

  
David R. Hornig (DH 1599)  
Guerric S.D.L. Russell (4845)  
Wall Street Plaza  
88 Pine Street, 7<sup>th</sup> Floor  
New York, New York 10005-1801  
Telephone No.: (212) 220-3830  
Facsimile No.: (212) 220-3780  
E-Mail: [dhornig@nicolettihornig.com](mailto:dhornig@nicolettihornig.com)  
(FILE NO.: 10000530 DRH/GSR)

TO: (via facsimile and regular mail)

HOFMANN & SCHWEITZER  
Attorneys for Claimant  
ROBERT BOODY  
360 West 31<sup>st</sup> Street, Suite 1506  
New York, New York 10001-2727  
Tel. No.: (212) 465-8840  
Facsimile: (212) 465-8849

Attention: Elizabeth Blair Starkey, Esq.

PILLINGER MILLER TARALLO, LLP  
Attorneys for Claimant  
EL SOL CONTRACTING and  
CONSTRUCTION CORPORATION  
570 Taxter Road, Suite 275  
Elmsford, New York 10523  
Tel. No.: (914) 703-6300  
File No.: LIB-00105/JTM  
Facsimile: (914) 703-6688

Attention: Jeffrey T. Miller, Esq.

RUBIN, FIORELLA & FRIEDMANN LLP  
Attorneys for Claimant  
METRO MARINE SALES, INC.  
292 Madison Avenue, 11<sup>th</sup> Floor  
New York, New York 10017  
File No.: 431-14563  
Facsimile: (212) 953-2462

Attention: Brendan Burke, Esq.

HERZFELD & RUBIN, P.C.  
Attorneys for Claimant  
FRANCOIS GUILLET  
125 Broad Street  
New York, New York 10004  
Facsimile: (212) 344-3333

Attention: James Donat, Esq.

**SCHEDULE A - DOCUMENTS TO BE PRODUCED**

1. Robert Boody's Federal and State Income Tax Returns for calendar years 2006, 2007, 2008 and 2009.
2. All accident reports prepared by Robert Boody.
3. Accident reports prepared by Carabie Corporation that concern or relate to Robert Boody's accident on January 29, 2008.
4. Any photographs of the location where the accident on January 29, 2008 occurred.
5. All medical reports concerning the treatment received by Robert Boody for the accident that occurred on January 29, 2008, excluding those produced as part of Robert Boody's Rule 26 Disclosure.
6. Statement of any person who claims to have witnessed the occurrence of the accident on January 29, 2008.

**AFFIDAVIT OF SERVICE**

STATE OF NEW YORK )

) ss.:

COUNTY OF NEW YORK)

SALMA ABDALLAH, being duly sworn, deposes and says:

1. I am employed by the firm of NICOLETTI HORNIG & SWEENEY, attorneys for Plaintiff in Limitation Northeast Marine, Inc. I am not a party to this action, am over 18 years of age, and reside in Brooklyn, New York.
2. On September 28, 2010, I served the annexed Notice of Deposition upon the following:

HOFMANN & SCHWEITZER  
Attorneys for Claimant  
ROBERT BOODY  
360 West 31<sup>st</sup> Street, Suite 1506  
New York, New York 10001-2727  
Tel. No.: (212) 465-8840  
Facsimile: (212) 465-8849

Attention: Elizabeth Blair Starkey, Esq.

PILLINGER MILLER TARALLO, LLP  
Attorneys for Claimant  
EL SOL CONTRACTING and  
CONSTRUCTION CORPORATION  
570 Taxter Road, Suite 275  
Elmsford, New York 10523  
Tel. No.: (914) 703-6300  
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Facsimile: (914) 703-6688

Attention: Jeffrey T. Miller, Esq.

RUBIN, FIORELLA & FRIEDMANN LLP  
Attorneys for Claimant  
METRO MARINE SALES, INC.  
292 Madison Avenue, 11<sup>th</sup> Floor  
New York, New York 10017  
File No.: 431-14563  
Facsimile: (212) 953-2462

Attention: Brendan Burke, Esq.

HERZFELD & RUBIN, P.C.  
Attorneys for Claimant  
FRANCOIS GUILLET  
125 Broad Street  
New York, New York 10004  
Facsimile: (212) 344-3333

Attention: James Donat, Esq.

at the address(es) designated by said attorney(s) for that purpose, by depositing true copy(ies) of same enclosed in postpaid, properly addressed wrapper(s) in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

3. The aforementioned documents were also delivered via facsimile by transmitting a copy of the papers to the said attorneys at the indicated facsimile telephone number(s) designated by the attorney(s) for that purpose.

*Salma Abdallah*  
SALMA ABDALLAH

Sworn to before me this  
28<sup>th</sup> day of September, 2010

*Mary Ann Raarup*  
Notary Public

MARY ANN RAARUP  
Notary Public, State of New York  
No. 01RA4874099  
Qualified in Suffolk County  
Certificate filed in New York County  
Commission Expires Oct. 20, 2010

\* \* \* COMMUNICATION RESULT REPORT ( SEP. 27. 2010 5:12PM ) \* \* \*

FAX HEADER 1: NICOLETTI HORNIG & SWEENEY  
FAX HEADER 2: 212-825-1865TRANSMITTED/STORED : SEP. 27. 2010 5:08PM  
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REASON FOR ERROR  
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**NICOLETTI HORNIG & SWEENEY**  
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**TELECOPIER 212-220-3780**  
**E-MAIL GENERAL@NICOLETTIHORNIG.COM**

---

**FACSIMILE TRANSMITTAL SHEET**

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TO: SEE BELOW	FROM: David R. Hornig, Esq.
COMPANY: SEE BELOW	DATE: SEPTEMBER 27, 2010
FAX NUMBER: SEE BELOW	TOTAL NO. OF PAGES INCLUDING COVER: 5
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 10000530 DRH/GSR
RE:	YOUR REFERENCE NUMBER:

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TO:

VIA FACSIMILE (212) 465-8849  
HOFMANN & SCHWEITZER  
360 West 31<sup>st</sup> Street, Suite 1506  
New York, New York 10001-2727

Attention: James Fitzsimons, Esq.

VIA FACSIMILE (914) 703-6688  
PILLINGER MILLER TARALLO, LLP  
570 Taxter Road, Suite 275  
Elmsford, New York 10523  
Attention: Jeffrey T. Miller, Esq.  
Your File No.: LIB-00105/JTM

VIA FACSIMILE (212) 953-2462  
RUBIN, FIORELLA & FRIEDMAN  
292 Madison Avenue, 11<sup>th</sup> Floor  
New York, New York 10017  
Attention: Brendan Burke, Esq.  
Your File No.: 431-14563

VIA FACSIMILE (212) 344-3333  
HERZFELD & RUBIN, P.C.  
Attorneys for Claimant  
FRANCOIS GUILLET  
125 Broad Street  
New York, New York 10004  
Attention: James Donat, Esq.

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**HOFMANN & SCHWEITZER**  
COUNSELLORS AT LAW AND PROCTORS IN ADMIRALTY

1-530

PAUL T. HOFMANN\*  
TIMOTHY F. SCHWEITZER\*

DARIO ANTHONY CHINIGO\*  
JAMES G. FITZSIMONS  
ELIZABETH BLAIR STARKEY  
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\*ALSO ADMITTED IN NJ

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September 29, 2010

By Telefax: 212-220-3780

David R. Hornig, Esq.  
Nicoletti Hornig & Sweeney  
88 Pine Street, 7<sup>th</sup> Floor  
New York, NY 10005

Re: In the Matter of the Petition of North East Marine, Inc.  
EDNY: CV-09-5600

Dear David:

I am in receipt of the notice to depose Robert Boody which you served on Sept. 27, 2010.

Please be advised, in light of the upcoming pre-motion conference before Judge Amon on October 20 and the anticipated motion practice which hopefully will follow, we respectfully decline to produce Mr. Boody on October 8 in response to your notice. If you wish, the matter can be discussed at the conference.

Very truly yours,  
**HOFMANN & SCHWEITZER**

By: *Elizabeth Blair Starkey*  
Elizabeth Blair Starkey

EBS/  
cc: Pilling Miller Tarallo, LLP  
Attorneys for El Sol  
Rubin, Fiorella & Friedmann, LLP  
Attorneys for Metro Marine Sales, Inc.

# Nicoletti Hornig & Sweeney

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Δ ALSO ADMITTED IN CALIFORNIA  
♀ ALSO ADMITTED IN MARYLAND

September 30, 2010

## VIA FACSIMILE (212) 465-8849

Elizabeth Blair Starkey, Esq.  
HOFMANN & SCHWEITZER  
360 West 31<sup>st</sup> Street, Suite 1506  
New York, New York 10001-2727

RE: *In the Matter of the Petition of North East Marine, Inc., As Owner of the Tug ELÉNA, a 35' Deck Barge and a 40' Deck Barge, For Exoneration from and Limitation of Liability*  
United States District Court – Eastern District of New York  
Case No.: 09 Civ. 5600 (Amon, J.)(Mann, M.J.)  
Your File No.: 08-22  
Our File: 10000530 DRH/GSR

Dear Ms. Starkey:

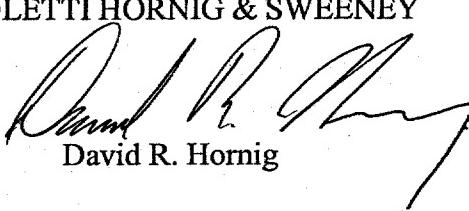
I am in receipt of your letter dated September 29, 2010. There has been no Order staying discovery in this action and therefore, you have no legitimate basis on refusing to produce Robert Boody for a deposition on October 8, 2010.

Kindly accept this letter as our good faith attempt to resolve this matter. Unless you advise us by the close of business today that you have reconsidered your position, we will have no alternative but to seek court intervention.

Very truly yours,

NICOLETTI HORNIG & SWEENEY

By:

  
David R. Hornig

DRH/lr

September 30, 2010

Page 2

cc:

**VIA FACSIMILE (914) 703-6688**

PILLINGER MILLER TARALLO, LLP

Attorneys for El Sol

570 Taxter Road, Suite 275

Elmsford, New York 10523

Tel. No.: 914-703-6300

Attention: Jeffrey T. Miller, Esq.

File No.: LIB-00105/JTM

**VIA FACSIMILE (212) 953-2462**

RUBIN, FIORELLA & FRIEDMAN

Attorneys for Metro Marine

292 Madison Avenue, 11<sup>th</sup> Floor

New York, New York 10017

Tel. No.: 212-953-2381

Attention: Brendan M. Burke, Esq.

File No.: 431-14563

**VIA FACSIMILE (212) 344-3333**

HERZFELD & RUBIN, P.C.

Attorneys for Claimant

FRANCOIS GUILLET

125 Broad Street

New York, New York 10004

Attention: James Donat, Esq.

## \* \* \* COMMUNICATION RESULT REPORT ( SEP. 30. 2010 12:39PM ) \* \* \*

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**E-MAIL GENERAL@NICOLETTIHORNING.COM**

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**HOFMANN & SCHWEITZER**  
**360 West 31<sup>st</sup> Street, Suite 1506**  
**New York, New York 10001-2727**

Attention: Elizabeth Blair Starkey, Esq.

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**570 Taxter Road, Suite 275**  
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**Attorneys for Claimant**  
**FRANCOIS GUILLET**  
**125 Broad Street**  
**New York, New York 10004**  
Attention: James Donat, Esq.

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## \* \* \* COMMUNICATION RESULT REPORT ( SEP. 30. 2010 12:57PM ) \* \* \*

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 FAX HEADER 2: 212-825-1865

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**NICOLETTI HORNIG & SWEENEY**  
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COMPANY: <b>SEE BELOW</b>	DATE: <b>SEPTEMBER 30, 2010</b>
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**360 West 31<sup>st</sup> Street, Suite 1506**  
**New York, New York 10001-2727**

Attention:    Elizabeth Blair Starkey, Esq.

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**RUBIN, FIORELLA & FRIEDMAN**  
**292 Madison Avenue, 11<sup>th</sup> Floor**  
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Attention:    Brendan Burke, Esq.  
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**570 Taxter Road, Suite 275**  
**Elmsford, New York 10523**  
Attention:    Jeffrey T. Miller, Esq.  
 Your File No.: LIB-00105/JTM

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Attention:    James Donat, Esq.

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HOFMANN & SCHWEITZER

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By ECF and REGULAR MAIL

Honorable Roanne L. Mann  
United States Magistrate Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: In the Matter of the Petition of North East Marine, Inc.  
EDNY: CV-09-5600

Dear Judge Mann:

Our office represents the Claimant Robert Boody in this limitation of liability litigation which has been referred to your Honor by Hon. Carol Amon. An initial conference was held on May 3, 2010 at which certain discovery dates were set. I enclose a copy of the discovery order.

I am writing with the consent of all claimants herein and the petitioner to request a 90-day extension of the discovery schedule.

All parties have submitted automatic disclosure as required by Rule 26. Formal document disclosure and depositions have not taken place.

However, among the maritime claimants, there have been substantive discussions concerning which of them is/are proper parties in this case. As a result of those discussions, there is a strong possibility that certain of them will no longer be part of the case, based on affidavits and documents exchanged among the parties.

In the meantime, I have written to Judge Amon to request a pre-motion conference for the purpose of filing a motion to stay the instant action and permit Mr. Boody to return to Queens County to litigate his personal injury claim, while stipulating to protect the petitioner's right to limit his liability in this action. A copy of that letter is enclosed.

*Application  
granted, on consent.  
Each of the deadlines  
contained in the  
Court's Calendar Order  
September 13, 2010  
of May 3, 2010 is extended  
by 90 days, on consent.  
The 11/10/10 settlement  
conference is adjourned  
to 2/7/11 at 9:30 a.m.*

*SO ORDERED:*

*/s/  
Roanne L. Mann  
U.S. Magistrate Judge  
Dated: 9/13/10*

HOFMANN & SCHWEITZER

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Hon. Roanne L. Mann

Re: In the Matter of the Petition of North East Marine, Inc.

EDNY: CV-09-5600

September 13, 2010

Therefore, on behalf of the litigants herein, I respectfully request a 90 day extension of all discovery deadlines.

Respectfully submitted,

HOFMANN & SCHWEITZER

By: Elizabeth Blair Starkey  
Elizabeth Blair Starkey

Enc.

cc: BY ECF and BY REGULAR MAIL

Hon. Carol Amon

Nicoletti Hornig & Sweeney

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Metro Marine and Francois Guillet

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ROANNE L. MANN  
UNITED STATES MAGISTRATE JUDGE

DATE: 5/03/10  
START: 12:30 p.m.  
END: 1:00 pm

DOCKET NO: 09-CV-5600 (CBA)CASE: North East Marine, Inc., et al. v. Boody, et al.

INITIAL CONFERENCE  
 DISCOVERY CONFERENCE  
 SETTLEMENT CONFERENCE

OTHER/ORDER TO SHOW CAUSE  
 FINAL/PRETRIAL CONFERENCE  
 TELEPHONE CONFERENCE

FOR PLAINTIFF:

Val WamserEl 50.1 Michael BurkeFOR DEFENDANT Boody James FitzmorrisS Metro Brendan Burke

FACT Gillet Joseph Donat DISCOVERY TO BB COMPLETED BY 8/20/10

NEXT Sett CONFERENCE SCHEDULED FOR 11/10/10 9:30 am

JOINT PRE-TRIAL ORDER TO BE FILED VIA ECF BY \_\_\_\_\_

PL. TO SERVE DEF. BY: \_\_\_\_\_ DEF. TO SERVE PL. BY: \_\_\_\_\_

RULINGS: PLEASE TYPE THE FOLLOWING ON DOCKET SHEET

Automatic disclosure shall be completed by 5/18/10.

Boody's expert disclosure shall be served by 9/30/10; the remaining parties' expert disclosure shall be served by 10/29/10. Expert depositions are deferred until after the Settlement conference.

Pleadings may be amended & new parties added until 5/28/10.